APPENDIX

Pertinent Extracts From Respondents' Argument in the Lower Courts

In the Chancery Court:

By Counsel for Futrovsky, the plaintiff-appellee below (Transcript of January 27, 1965, at pp. 6-7):

> Unless there be any doubt or misgivings about the future, the public was informed before they put their dollars on the barrelhead and bought their shares that it was the intention of the partners of Max Shapiro, the Lehrmans and the Cohens, that the net profits of the partnership in future years—that is after the public came in with their investments—would continue in the percentage range as high as 4.9% established in the past seven years.
>
> As your Honor knows, under the applicable law, nobody was permitted to buy a share of stock on this original issue without his first being delivered in hand—not by constructive notice, not by fictional notice, but by actual delivery in hand of the piece of paper which I am now holding in my hand, which is the prospectus, and this notification of what had been before and what was to continue in the future.
>
> . . . Not 99%, your Honor, but 100% of the shareholders who bought their subscriptions knew about this—actually, and not constructively merely.

By Counsel for the individual defendant-appellees below (*id.* at pp. 21-22):

> Your Honor, I will point out—I don't know whether Mr. Pomerantz [Counsel for Futrovsky] did—that the Securities Act requires that on a public offering of stock by an issuer such as this offering we have here, for a period of 60 days, I think, the law requires that

the purchaser receive a copy of the prospectus, and as Mr. Pomerantz pointed out, at page 12 of the prospectus which was issued in September, 1959, there is a complete disclosure of the relations between Giant and Max Shapiro. I agree with Mr. Pomerantz that there is in effect—each stockholder buying his shares with this prospectus before him—I agree with Mr. Pomerantz that there has been 100% acquiescence and ratification by the stockholders of these arrangements.

In the Delaware Supreme Court:

By Counsel for Futrovsky (Brief, pp. 10-11):

> The public purchased Giant's shares on the basis of the Prospectus. The purchasers were thus put on notice, by the Prospectus, that Giant's dealings with Max Shapiro would henceforth continue in the future as in the past. This was one of the essential foundations of the contract created by the Prospectus offering and its acceptance by the purchasers of Giant's stock.

By Counsel for the individual defendants (Brief, p. 24):

> In short, the [Securities] Act requires, as a practical matter, that all purchasers of Giant shares in 1959 be furnished with a copy of the prospectus . . .

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

Isaac D. Short, 2nd
Vice-Chancellor

Court House
Georgetown, Delaware

January 28, 1965

Irving Morris, Esquire
Bank of Delaware Building

Howard M. Handelman, Esquire
Bank of Delaware Building

Richard F. Corroon, Esquire
350 Delaware Trust Building

Richard L. Sutton, Esquire
3000 duPont Building

Edward Rappaport, Esquire
38 N. Main Street
Gloversville, N. Y.

Re: Futrovsky vs. Cohen
C.A. No. 1930

Gentlemen:

I have considered the terms of the proposed settlement in the above matter in the light of the objections thereto made by the stockholders Goodman and Cash and am satisfied that the terms proposed are fair and equitable. I am satisfied, also, that if this litigation were pursued it is most unlikely that the stockholders would obtain even the benefits that the settlement provides. I say this for the reason that the cause of action stated in the complaint and reasserted by the objectants could not, in all probability, withstand the defense of estoppel, whether by ratification or acquiescence.

I am not impressed by the tax arguments advanced by Mr. Rappaport. Not only is no tax assessment threatened, but it is doubtful that an assessment could properly be made under the circumstances.

Accordingly, the motion of the Goodmans for leave to intervene is denied, the objections are overruled, and an order will be signed, on presentation, approving the proposed settlement.

Yours very truly,

/s/ Isaac D. Short, 2nd.

IDS:r
cc: Register in Chancery

IN THE SUPREME COURT OF THE STATE OF DELAWARE

No. 31, 1965

Leonard S. and Barbara L. Goodman, Objecting Stockholders of Giant Food Inc., Below, *Appellants*,

v.

Charles J. Futrovsky, Plaintiff Below, *Appellee*,

and

N. M. Cohen, Emanuel Cohen, Jacob Lehrman, Israel Cohen and Giant Food Inc., Appearing Defendants Below; Charlotte Ferson Lehrman, Joseph B. Danzansky, and Israel Cohen, Emanuel Cohen and Lillian C. Solomon, doing business under the firm name and style of Max Shapiro, non-appearing Defendants Below, *Appellees*.

(September 17, 1965)

Wolcott, Chief Justice; Carey, Justice, and Wright, Judge, sitting.

Appeal from the Court of Chancery in and for New Castle County.

Richard L. Sutton of Morris, Nichols, Arsht & Tunnell, Wilmington, and Leonard S. Goodman, Washington, D. C., for appellants.

Irving Morris of Cohen, Morris & Rosenthal, Wilmington, and Abraham L. Pomerantz of Pomerantz, Levy, Haudek & Block, New York City, for appellee Charles J. Futrovsky.

Howard M. Handelman of Bayard, Brill, Russell & Handelman, Wilmington, for Giant Food Inc.; Richard F. Corroon of Berl, Potter & Anderson, Wilmington, for individual defendants, and Danzansky & Dickey, Washington, D. C.

WOLCOTT, C. J.:

This is an appeal by objecting stockholders of Giant Food, Inc., (hereafter "Giant") from the Vice Chancellor's approval of a settlement of a stockholder's derivative action. The action was commenced by the stockholder, Goodman [sic], appellee here. The complaint charged that the officers and directors of Giant caused it to purchase all of its produce requirements from Max Shapiro, a partnership, owned by the Cohen and Lehrman families, also in control of Giant; that Shapiro serves no useful business purpose for Giant; and that Shapiro is solely a device to divert profits from Giant to the Cohen and Lehrman families. As an alternative, the complaint charged that if in fact Shapiro did perform a business function for Giant, its profits had become excessive.

Following a period of legal research and discovery, plaintiff's counsel concluded that the first theory advanced in the complaint was without merit, but that the second theory, i.e., the unfairness to Giant of the excessive earnings of Shapiro, under the rule of *Rogers* v. *Hill,* 289 U.S. 582, 53 S. Ct. 731, and *Saxe* v. *Brady,* 40 Del. Ch. 474, 184 A. 2d 602, held forth some prospect of recovery. In the light of this conclusion the settlement agreement was negotiated.

The settlement provided in substance that Giant and

Shapiro shall enter into a 10-year contract under which Shapiro shall supply all produce required by Giant; that Shapiro's annual profits shall be the lesser of 3.9% of its net sales to Giant, or $350,000; that at the end of the contract period Giant shall have an option to purchase Shapiro for $1,500,000; that releases shall be given to the individual defendants, and that Giant shall pay plaintiff's counsel a fee of $100,000.

The Vice Chancellor ordered notices to be sent to the 2,770 stockholders of Giant of a hearing on the fairness of the proposed settlement. At the hearing the objectors, appellants here, and one other stockholder appeared in opposition to the settlement. The Vice Chancellor approved the settlement and this appeal followed.

A short statement of the factual background of Giant and Shapiro seems required. In 1935 the Cohen and Lehrman families started a supermarket business in the Washington, D. C. area. The enterprise has since been and is now under the equal control of the Cohen and Lehrman families. Giant grew from one store opened in 1936 to fifty supermarkets in 1959, grossing an average of $2,650,000 annually per store.

Prior to 1940 Giant purchased its produce direct from wholesalers but in 1940, in order to establish and maintain a uniform standard for produce, formed a produce company to supply its produce requirements. Accordingly, Washington Wholesale Produce Company was organized and financed by the Cohen and Lehrman families. This company acquired produce from other wholesalers in less than carload lots and then resold it to Giant.

During World War II, due to the heavy demands of the armed services, the primary sources of produce established a quota system among wholesalers. No such quota was available to Washington Wholesale Produce Company since it had always theretofore purchased produce through other wholesalers. Giant, therefore, found itself at a dis-

advantage in acquiring the produce needed for retail in its stores.

In 1944 Max Shapiro, a large produce wholesaler in the Washington area, was offered for sale. Primarily, in order to acquire the quotas belonging to Shapiro, the Cohen and Lehrman families bought it, using funds supplied from their personal assets. At the time of this purchase the members of these two families were the only stockholders of Giant.

Shapiro thereafter has supplied the produce requirements of Giant. In so doing, it sells to Giant at prices which enable Giant to retail on a competitive basis, which sometimes requires Shapiro to readjust its prices to Giant, even on occasion taking a loss on some particular item. The result has been a constantly maintained high standard for produce. So much so that the rate of rejection of low quality produce by Giant has been reduced in the past few years to only 1% or 2%.

In 1959, in order to further expand Giant, the Cohen and Lehrman families decided to attract new capital by a public offer of Giant stock. Accordingly, in that year, through Auchincloss, Parker & Redpath, and Kidder, Peabody & Co. Incorporated, principal underwriters, 200,000 shares of nonvoting Common Stock A was sold to the public at $16 per share. The offer was made with the stated intention on the part of Giant to put the Common Stock A on an annual dividend basis of 40¢, which has since been maintained.

Prior to the public offer of Giant Common Stock A the underwriters suggested to the Cohens and Lehrmans that they include Shapiro in Giant's assets in consideration of 135,000 shares of Common Stock A, later increased to 335,000 shares. Finally, however, the underwriters and the directors of Giant concluded that an additional 335,000 shares would dilute the offer of Common Stock A to be

offered to the public. It was therefore concluded wise to continue the separate existence of Giant and Shapiro.

The Common Stock A was sold in 1959 under a Prospectus which fully revealed the relationship between Giant and Shapiro, including ownership of Shapiro by the Cohen and Lehrman families. In this connection, it was stated that Shapiro did business only with Giant, that its earnings varied from 3.5% to 4.4% of its net sales to Giant, amounting in 1959 to $334,715, and that it was the intention of the owners of Shapiro to continue its net profit from its business with Giant for the future in the established percentage ranges.

The Prospectus of 1959 was followed with others of 1961 and 1963, all of which are on file with the Securities and Exchange Commission and the American Stock Exchange. All of them set forth to the same extent as in the original the Giant-Shapiro relationship.

We are concerned in this appeal with review of the approval of a settlement of a derivative action. The function of this Court in such a review is merely to determine whether or not the court below has committed an act of judicial indiscretion in approving the settlement in the exercise of business judgment. We do not exercise our own judgment to determine anew the question of the intrinsic fairness of the settlement. *Hoffman* v. *Dann,* 205 A. 2d 343.

The appellants take the position that the purchase by Giant of all of its produce requirements from Shapiro is a fraud upon Giant and its Common Stock A since, it is argued, it serves no purpose other than diverting to the Cohens and Lehrmans profits which otherwise would inure to the benefit of Giant's stockholders. They say, therefore, that it was improvident to enter into the settlement before us dismissing a cause of action clearly meritorious.

We think, however, that appellants are wrong when they categorize the original acquisition of Shapiro by the

Cohens and Lehrmans as a fraud on Giant. At the time of acquisition the Cohens and Lehrmans were the sole owners of Giant and could do with it as they wished. It was entirely proper, at least at that time, for them to decide to acquire Shapiro and keep its existence separate from Giant. Particularly is this so when they used their own money, not Giants, to make the purchase. At the time of purchase, furthermore, there was no one with standing to object to the decision thus made.

The situation, therefore, was that the Cohens and Lehrmans at the time the public offer of Giant stock was made owned two separate and distinct businesses. They finally determine to permit the public to buy a share of only one of them—Giant. This, it seems to us, was their privilege, and the buying public may not complain of that decision as long as it was not misled to its injury.

The plain fact is that in 1959 there was no intention on the part of the Cohens and Lehrmans to include Shapiro as an asset of Giant in their offer to sell Giant stock. Full disclosure of that fact was made in the Prospectus under which the stock was offered to the public. It is quite plain, therefore, that the purchasers of Giant stock knew at the time that they were buying into Giant and that Giant for the future would continue to buy its produce from the independent wholesaler, Shapiro. In the light of this knowledge the purchasers will not be heard to now claim that they are entitled to something for which they have not paid.

If authority is needed for this conclusion, it is to be found in *Solimine* v. *Hollander,* 128 N.J. Eq. 228, 16 A. 2d 203, a case almost directly in point. We think, however, no authority is needed to support a conclusion resting on common sense and elementary fairness.

Appellants argue that there is no proof that the public stockholders of Giant in fact received copies of the Prospectus prior to the purchase of their stock. However,

Section 5(b)(2) of the Securities Act of 1933 (15 U.S.C. §§ 77, et seq.) required as a practical matter that the 1959 purchasers of Giant stock be furnished with a copy of the Prospectus.

It is argued, however, that there are loopholes in Section 5 which were taken advantage of by the underwriters to insure that the original purchasers did not receive a copy of the Prospectus. The argument is tenuous at best and is directly contradicted by the answer averring that the plaintiff received a Prospectus at the time of his purchase. On the record before us we think we would be wrong to ascribe to the underwriters an intention to circumvent the clear intention of the Securities Act which is to force full disclosure of pertinent information.

We think it most probable that the 1959 purchasers of the Giant stock made their purchases with full knowledge of the separate existence of Shapiro and the intention to continue that separate existence. The original purchasers could not, therefore, successfully complain of the continuance of Shapiro as a separate business. *Finch* v. *Warrior Cement Corp.*, 16 Del. Ch. 44, 141 A. 54; *Elster* v. *American Airlines, Inc.*, 34 Del. Ch. 94, 100 A. 2d 219.

All of the present holders of Giant's Common Stock A including the objectors trace the title to their shares to the purchases of the 1959 issue. This being so, they are bound by the acquiescence, with full knowledge, of their predecessors and are now precluded from attacking the Giant-Shapiro relationship. 13 *Fletcher, Cyclopedia of Corporations*, § 5866; *Henderson* v. *Plymouth Oil Co.*, 15 Del. Ch. 40, 131 A. 165.

We think, therefore, that the first theory for recovery advanced in the complaint was properly determined by counsel for the plaintiff to have no merit. As a result of this, the settlement was negotiated upon the alternate theory of recovery, the allegedly excessive earnings of

Shapiro. Appellants, however, contend that the settlement in fact confers no benefit upon Giant.

We think to the contrary, however. In the first place the future earnings of Shapiro are limited to not in excess of $350,000 annually. The 1963 earnings of Shapiro were $403,767, and its estimated earnings on the old basis for 1964 and 1965 are $417,300 and $471,900 respectively. Assuming conservatively, in view of the rapid growth of Giant in the past and the prospect of a future continuance of growth for the future, that the savings to Giant made by the restrictions on Shapiro's profit amounts to $100,000 annually, the total saving to Giant over the ten-year life of the contract is $1,000,000.

In addition, at the end of the contract term Giant has an option to purchase Shapiro at the fixed price of $1,500,000 which is 4.8 times the $350,000 annual earnings of Shapiro permitted by the settlement. Furthermore, not without significance in this connection is the fact that in 1959 the underwriters offered in effect to purchase from the Cohens and Lehrmans the Shapiro business for 335,000 shares of the Common Stock A valued at $16 per share. This set a value of Shapiro at $5,260,000. We think, under the circumstances, that an option to purchase Shapiro for $1,500,000 cannot be said to be inequitable.

For the foregoing reasons we affirm the judgment below approving the settlement.

Mandate

THE SUPREME COURT OF THE STATE OF DELAWARE

To the Honorable the Judges of The Court of Chancery of the State of Delaware in and for New Castle County:

GREETING:

WHEREAS, before you or some of you in a cause entitled as follows:

Civil Action No. 1930

CHARLES J. FUTROVSKY

v.

N. M. COHEN, ET AL.

a certain judgment or order was entered on the 3rd day of February 1965, to which reference is hereby made; and

WHEREAS, by appropriate proceedings the said cause was duly appealed to this Court, and after hearing has been finally determined, as appears from the opinion of this Court filed in the cause on September 20, 1965, a certified copy of which is attached hereto;

ON CONSIDERATION WHEREOF IT IS ORDERED AND ADJUDGED that the said judgment or order be and it is hereby affirmed with costs, hereby taxed in the sum of One Hundred Fifty-seven and 80/100 Dollars ($157.80) to be recovered by the individual defendants against Leonard S. Goodman and Barbara L. Goodman with right of execution; and the said cause is hereby remanded with instructions to take such further proceedings therein as may be necessary in conformity with the opinion of this Court.

WITNESS the Honorable Daniel F. Wolcott, our Chief Justice, at Dover, the first day of January, A. D. 1965.

Issued October 25, 1965.

(SEAL) /s/ T. E. TOWNSEND, JR.
Clerk of the Supreme Court.

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IN THE

Supreme Court of the United States

October Term, 1965.

No. 932.

LEONARD S. GOODMAN and BARBARA L. GOODMAN,
Petitioners,

v.

CHARLES J. FUTROVSKY,
Plaintiff-Appellee Below,

and

N. M. COHEN, EMANUEL COHEN, JACOB LEHRMAN, ISRAEL COHEN, GIANT FOOD, INC., CHARLOTTE FERSON LEHRMAN, JOSEPH B. DANZANSKY; and ISRAEL COHEN, EMANUEL COHEN, and LILLIAN C. SOLOMON, doing business as Max Shapiro,
Defendants-Appellees Below,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

LEROY A. BRILL,
HOWARD M. HANDELMAN,
Continental American Building,
Wilmington, Delaware,
Attorneys for Defendant-Appellee Below, Respondent, Giant Food Inc.

WILLIAM S. POTTER,
RICHARD F. CORROON,
Delaware Trust Building,
Wilmington, Delaware,
Attorneys for Individual Defendants-Appellees Below, Respondents.

DANZANSKY & DICKEY,
Washington, D. C.,
Of Counsel.

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-5711 Area Code 215

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1965.

No. 932.

LEONARD S. GOODMAN AND BARBARA L. GOODMAN,
Petitioners,

v.

CHARLES J. FUTROVSKY,
Plaintiff-Appellee Below,

and

N. M. COHEN, EMANUEL COHEN, JACOB LEHRMAN, ISRAEL COHEN, GIANT FOOD, INC., CHARLOTTE FERSON LEHRMAN, JOSEPH B. DANZANSKY; AND ISRAEL COHEN, EMANUEL COHEN, AND LILLIAN C. SOLOMON, DOING BUSINESS AS MAX SHAPIRO,
Defendants-Appellees Below,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

QUESTIONS PRESENTED.

1. Since the decision of the highest court of Delaware can be wholly sustained on independent grounds of state law, does this Court have jurisdiction under 28 U. S. C. § 1257(3)?

2. Is there a substantial federal question which this Court should review under 28 U. S. C. § 1257(3)?

STATEMENT OF THE CASE.

The judgment below approves the settlement of a stockholder's derivative action brought by a stockholder of Giant Food Inc., a Delaware corporation ("Giant"). The action was commenced February 13, 1964. Not until three months thereafter—in May, 1964—did the petitioners purchase their shares of Giant (Pet. 3).* On January 27, 1965, when the settlement which had been agreed to by the parties came before the Delaware Court of Chancery for approval, petitioners appeared as objectors thereto and were given full opportunity to be heard.

Having duly considered the evidence and the arguments in support of the settlement and the objections thereto, the Court of Chancery found that it was "fair, adequate and reasonable and in the best interests of Giant Food Inc. and all its stockholders" and entered judgment in favor of the individual defendants (51a).

Giant operates supermarkets in the Washington, D. C. area. Plaintiff below, who had bought his shares in 1959 when Giant first went public, complained that the officers and directors of Giant caused it to purchase all its produce requirements from a partnership known as Max Shapiro, which was owned by the directors and officers of Giant. The complaint alleged that the Max Shapiro-Giant relationship was a fraud on Giant and that Max Shapiro served no useful purpose and had been used solely for the purpose of diverting profits from Giant to its officers and directors. Alternatively, plaintiff charged that if Max Shapiro did perform a business function, the profits realized by it were excessive and unreasonable.

Prior to 1959, all the shares of Giant had been owned by members of the Cohen and Lehrman families. In 1940, the

* "Pet. —" refers to the petition herein. The pages of petitioners' appendix and respondents' appendix are numbered consecutively; references to pages 1a through 12a are to petitioners' appendix and to pages 17a through 52a are to respondents' appendix.

two families established the Washington Wholesale Produce Company, from which Giant purchased its produce. During World War II, the primary sources of produce established quota systems. Since Washington Wholesale Produce Company had bought its produce through other wholesalers, no quotas were available to it and it operated at a great disadvantage. In 1944, however, Max Shapiro, one of the largest wholesalers of produce in the Washington area, was put up for sale. In order to attain quotas and thus to enable Giant to sell produce to its customers, the Cohens and the Lehrmans, using their personal funds and not Giant's, bought Max Shapiro. *Goodman v. Futrovsky*, — Del. Ch. —, 213 A. 2d 899, 901 (1965). At the time of the purchase, the Cohens and Lehrmans were the only stockholders of Giant (6a-7a).

The Max Shapiro-Giant relationship operates to the advantage of Giant. The Supreme Court of Delaware summarized the testimony as follows (7a):

> "Shapiro thereafter has supplied the produce requirements of Giant. In so doing, it sells to Giant at prices which enable Giant to retail on a competitive basis, which sometimes requires Shapiro to readjust its prices to Giant, even on occasion taking a loss on some particular item. The result has been a constantly maintained high standard for produce. So much so that the rate of rejection of low quality produce by Giant has been reduced in the past few years to only 1% or 2%."

In late 1959, Giant for the first time sold shares to the public. 200,000 shares of non-voting Common Stock A were sold at $16 per share. Prior to the public offering, the underwriters suggested that the Cohens and the Lehrmans put Max Shapiro into Giant for a consideration of 335,000 shares of Common Stock A; this represented approximately $1 per share of Giant earnings for each $1 per share of Max Shapiro earnings and a total proposed consideration of $5,360,000 at $16 per share.